Chang et al v. Virgin Mobile USA LLC et al Doc. 59

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN CHANG, AS NEXT FRIEND OF ALISON CHANG, A MINOR, AND JUSTIN HO-WEE WONG,	§	
Plaintiffs,	§	CA No. 3:07-cv-1767
V.	§	
VIRGIN MOBILE PTY LTD.,	§	
Defendant.	§	

DEFENDANT VIRGIN MOBILE (AUSTRALIA) PTY LTD.'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SUR-REPLY TO DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Defendant Virgin Mobile Pty Ltd. ("Virgin Australia") opposes Plaintiffs Susan Chang, as next of friend of A.C. ("Chang" or "A.C.") and Justin Ho-Wee Wong's ("Wong") (collectively "Plaintiffs") Motion for Leave to File Sur-Reply to Virgin Australia's Reply to Plaintiffs' Opposition to Virgin Australia's Motion to Dismiss [incorrectly titled Plaintiffs' Third Motion to Extend Deadline to Respond to Defendant's Motion to Dismiss, docket No. 57, filed on August 13, 2008]. Plaintiffs cannot show good cause for seeking leave to file a sur-reply. According, the Court should deny the Motion in its entirety.

I. THE COURT SHOULD DENY PLAINTIFFS' MOTION.

A. The Third Party Vendors Have Been Known To The Entire World Wide Web, In Addition To Being Known To The Plaintiffs Through The Discovery Process.

In their Motion, Plaintiffs allege that they learned of the third party vendors Host and The Glue Society[1] for the "first time" in Defendant's August 8, 2008 reply in support of its motion to dismiss, and that they need an opportunity to respond to Defendant's allegedly "new" argument.

[1] Host is a third party marketing vendor company based in Australia that Virgin Mobile retained to design and develop the marketing campaign at issue. In turn, Host worked with The Glue Society to obtain creative content to include in Host's proposed advertising campaigns to the Defendant.

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Plaintiffs' argument has no basis in fact, and is in fact contrary to the Internet postings available to the Plaintiffs and the discovery record in this case.

Long before Plaintiffs even filed the lawsuit, Sesh00, the very person who posted the original picture of A.C. on the website,[2] correctly identified the vendors that created and developed the "Are you with us or what campaign." Attached to Defendant's Appendix is the Declaration of Lisa Meyerhoff containing a true and correct copy of Sesh00's posting - within a few blogs of Damon Chang's (Plaintiff A.C.'s brother) notice to the world that he helped retain Fitz and Zehl as counsel for the Plaintiffs.

In addition to the rest of the world being placed on notice of the third party vendors, Defendant served its supplemental answers to Plaintiffs' interrogatories on **April 18, 2008.** In the supplemental answers, Virgin Mobile identified Host and The Glue Society as the third party vendors that designed and developed the Australia advertising campaign.[3]

Plaintiffs also obtained this same vendor information from the corporate deposition of Virgin Mobile. Specifically, less than one week after receiving Virgin Mobile's supplemental interrogatory answers, on **April 23, 2008,** Plaintiffs' counsel deposed the Defendant's corporate representatives, including marketing representative David Cain. Mr. Cain also identified the third party vendors Host and The Glue Society, and he described their roles in the Australia advertising campaign. In short, there was no "surprise" to the Plaintiffs about Host and The Glue Society in Defendant's August 8, 2008 reply.[4]

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[2] *See* APP 3-8.

[3] *See* Defendant Virgin Mobile Pty Limited's First Supplemental Objections and Answers to Plaintiffs' Original (First) Interrogatories. APP 9-15.

[4] *See* Cain Depo., p. 10, l. 13 - p. 11, l. 9 (APP 19); p. 11. 10–25 (APP 19); p. 13, ll. 13 – p. 14, l. 1 (APP 20-21); p. 15, ll. 6 -16 (APP 21-22); p. 16, ll. 3-18 (APP 22-23); p. 16, l. 23 - p. 17, ll. 1-3 (APP 22); p. 17, l. 21- p. 19, l. 12 (APP 22-23); p. 20, ll. 3-10 (APP 24); p. 20, l. 17 - p. 21, l. 16 (APP 24); p. 23, l. 25 - p. 24, l. 12 (APP 25-26); p. 24, l. 21 - p. 25, l. 16 (APP 26); p. 28, l. 8 - p. 29, l. 5 (APP 27); p. 29, l. 17- p. 30, l. 5 (APP 27-28); p. 32, ll. 5-14 (APP 29); p. 32, l. 23 – p. 35, l. 7. (APP 29-30); p. 35, l. 17 - p. 36, l. 9 (APP 30-31); p. 37, l. 9 - p. 39, l. 14

B. Plaintiffs Have Never Plead Any Agency Theory.

Plaintiffs have known of Host and The Glue Society since April 18, 2008,[5] yet, Plaintiffs failed to seek any discovery from these entities, and failed to amend their Complaint to allege **any** agency theory of liability, much less jurisdiction. Indeed, Plaintiffs' Complaint is completely silent regarding Plaintiffs' 11th hour theory of jurisdiction or liability based on an agency theory.

C. This is Plaintiffs' Last Ditch Effort to Manufacture Evidence of Personal Jurisdiction Where There is None.

Plaintiffs were originally required to file their opposition to the Defendant's motion to dismiss on January 9, 2008. Since then, Plaintiffs have had multiple opportunities to gather whatever evidence they wanted to use to establish the Court's ability to exercise personal jurisdiction over the Defendant. **Seven** months and **three** extension later, Plaintiffs still have no evidence to support their argument, so they are trying out another unplead theory – agency.

D. Virgin Mobile is Being Prejudiced by Plaintiffs' Continuing Delay.

Since the Fall 2007, Virgin Mobile has had to respond to the Plaintiffs' jurisdictional discovery; present corporate witnesses; and rebut every argument that Plaintiffs have offered on the personal jurisdiction issue. Virgin Mobile continues to be prejudiced by the Plaintiffs' futile efforts to come up with a valid theory for personal jurisdiction over Virgin Mobile. The parties have fully argued their positions to the Court. The motion for leave is Plaintiffs' latest attempt to delay the Court ruling on the Defendant's motion. The jurisdiction issue is ripe for the Court to rule on, and was fully briefed by Plaintiffs in their Opposition.

(APP 31-32); p. 39, l. 25 - p. 40, l. 23 (APP 32-33); p. 41, ll. 6-23 (APP 33); p. 42 - ll. 15-20 (APP 34); p. 46, l. 21 - p. 47, l. 15 (APP 35); p. 48, ll. 7-19 (APP 36).

[5] In fact, that Plaintiffs knew of Host and The Glue Society as early as mid-2007 is evidenced by the fact that Plaintiff's brother, Plaintiff A.C., and Plaintiff Justin "Chewy" Wong all posted to the same Flickr website as Sesh00 and that Sesh00 identified Host and The Glue Society in his web posting. *See* APP 1, ¶ 3; APP 3-8.

II. CONCLUSION.

The Plaintiffs have failed to show good cause why they should be permitted to file a sur-reply in this case. Plaintiffs had an opportunity to fully brief their opposition to the motion to dismiss, and conduct any discovery (including to third parties) that they chose. Left with no evidence, they now offer yet another theory for the Court's alleged jurisdiction over Virgin Mobile. Virgin Mobile continues to be prejudiced by the Plaintiffs' ongoing delay. Accordingly, the Court should deny Plaintiffs' motion for leave to file a sur-reply.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT
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CERTIFICATE OF SERVICE

I hereby certify that, on the 14th day of August 2008, I electronically filed the foregoing "Defendant Virgin Mobile (Australia) Pty Ltd.'s Opposition to Plaintiffs' Motion for Leave to File Sur-Reply to Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss" with the Clerk of Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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